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PP v. EBRAHIM MIRZAIE HJ EBRAHIM DEH MOKHTAR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: B-05-345-02-2014]
2 NOVEMBER 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in methamphetamine – Appeal against acquittal – Prima facie case – Whether established – Trial judge revisited earlier findings and concluded there were still issues regarding identity and colour of bag containing drugs – Whether trial judge should direct his mind on whether evidence posited by respondent created reasonable doubt to warrant acquittal – Whether trial judge misdirected himself on different approach – Evidence of witnesses – Whether uncontroverted – Whether trial judge rejected testimonies of witnesses without assigning any reason – Whether bag containing drugs the same bag carried by accused – Whether defence of accused an afterthought – Whether appellate intervention warranted – Whether accused ought to be sentenced to death under s. 39B(2) of Dangerous Drugs Act 1952*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal – Trafficking in dangerous drugs – Prima facie case – Whether established – Trial judge revisited earlier findings and concluded there were still issues regarding identity and colour of bag containing drugs – Whether trial judge should direct his mind on whether evidence posited by respondent created reasonable doubt to warrant acquittal – Whether trial judge misdirected himself on different approach – Evidence of witnesses – Whether uncontroverted – Whether trial judge rejected testimonies of witnesses without assigning any reason – Whether bag containing drugs the same bag carried by accused – Whether defence of accused an afterthought – Whether appellate intervention warranted – Whether accused ought to be sentenced to death under s. 39B(2) of Dangerous Drugs Act 1952*

G The respondent was charged for the offence of trafficking 899g of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 28 July 2010, PW2 and his team were on surveillance duty at the arrival hall of the Kuala Lumpur International Airport when they spotted the respondent pulling a brown coloured trolley bag (exh. P10) and carrying
H a sling bag. Upon scanning the brown bag, PW2 noticed a suspicious object at the bottom of the brown-coloured bag and proceeded to cut the bottom part of the said bag where a translucent plastic packet containing crystal like substance was found, which was subsequently confirmed to be methamphetamine. The respondent was thus arrested and his bags and drugs
I were seized. The respondent was acquitted and discharged at the end of the prosecution's case. However, the Court of Appeal allowed the prosecution's appeal in respect of the said acquittal and discharge and ordered the respondent to enter his defence. The defence was heard before the same trial

judge and the respondent was again acquitted and discharged. Hence, this appeal. The trial judge found as a fact that the respondent's defence was that the brown-coloured bag did not belong to him and that the bag which he had been carrying was blue in colour. The appellant, however, posited the following grounds of appeal (i) the trial judge had erred when he found that there was doubt regarding the identity and colour of the bag; (ii) the materiality of the absence of CCTV evidence, DNA profiles and fingerprint impressions and (iii) the trial judge had failed to consider that the defence was an afterthought.

Held (allowing appeal; setting aside order of acquittal and discharge)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The trial judge had embarked on an exercise to revisit his earlier findings and concluded at the end of the defence case that there were still issues regarding the identity and colour of the bag containing the drugs that was carried by the respondent when this court had ruled and ordered the respondent to enter his defence. Since the Court of Appeal had ordered the respondent to enter his defence, it must be taken that the Court of Appeal had ruled that the prosecution had made out a *prima facie* case against the respondent in respect of the charge levelled against him. (paras 33 & 34)

(1a) The Court of Appeal must have conducted a maximum evaluation of the evidence available before it ruled that a *prima facie* case had been made out. Hence, the Court of Appeal had ruled that the prosecution had adduced credible evidence proving such ingredient of the offence, which, if unrebutted or unexplained, would warrant a conviction. And this must necessarily include the finding that the brown-coloured bag was the bag containing the said drugs that was carried by the respondent and later seized by PW2 and his team. As the respondent could be convicted on the said *prima facie* evidence, it must be taken that the Court of Appeal must have ruled that the *prima facie* evidence 'must have reached a standard which is capable of supporting a conviction beyond reasonable doubt.' (*Balachandran v. PP*, refd). Since the previous panel of the Court of Appeal had ordered the respondent to enter his defence, the trial judge should hence direct his mind on whether the evidence posited by the respondent had created a reasonable doubt to warrant his acquittal. The trial judge had clearly misdirected himself when he took a different approach altogether. (paras 34 - 36)

(2) The evidence of both PW2 and PW3 were uncontroverted that they had seen the respondent pulling the bag exh. P10 before and at the time they approached the respondent. The bag they saw and seized was a brown coloured bag. The investigating officer, PW5, testified that the bag he received from PW2 was brown in colour. The photograph of the said bag in exh. P5(9) also appeared brownish in colour. There was more than ample direct evidence to conclude a definite finding that the bag

exh. P10 was the same bag that was carried by the respondent containing the said drugs. Hence, the materiality of the CCTV evidence, DNA profiles and fingerprint impression, which was only of corroborative value, assumed little significance in light of such direct evidence. The trial judge had ignored and rejected the testimonies of PW2, PW3 and PW5 in respect of the same without assigning any reason, or reasons thereto, an imperative exercise in the evaluation of witnesses, more so when the evidence of principal witnesses were rejected. (paras 40 - 48)

(3) The respondent's defence was a recent invention, rendering it to be an afterthought incapable of being accorded its due weight. On the other hand, PW2 and PW3's evidence on how and where they found the said luggage bag was unshaken to the end. The findings of the trial judge in respect of the bag in issue was verily against the weight of evidence. It merited appellate intervention. Thus, the order of acquittal and discharge of the respondent was set aside and substituted with a conviction under the charge as proffered against him. Correspondingly, the respondent was sentenced to suffer the death penalty under s. 39B(2) of the DDA, by hanging according to law. (paras 50 - 52)

Bahasa Malaysia *Headnotes*

Responden dituduh dengan kesalahan mengedar 899g methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 28 Julai 2010, PW2 dan pasukannya bertugas mengawasi dewan ketibaan Lapangan Terbang Kuala Lumpur apabila mereka melihat responden sedang menarik beg troli berwarna coklat (eks. P10) dan menggalas beg sandang. Apabila mengimbas beg coklat, PW2 melihat terdapat objek yang mencurigakan pada bahagian bawah beg coklat itu dan terus memotong bahagian bawah beg tersebut di mana satu paket lutsinar mengandungi bahan seperti kristal ditemui, yang kemudiannya disahkan sebagai methamphetamine. Responden ditahan dan beg-begnya serta dadah-dadah dirampas. Responden dilepaskan dan dibebaskan pada akhir kes pendakwaan. Walau bagaimanapun, Mahkamah Rayuan membenarkan rayuan pihak pendakwaan bagi pelepasan dan pembebasan tersebut dan memerintahkan responden memasukkan pembelaan. Pembelaan didengar di hadapan hakim bicara yang sama dan responden sekali lagi dilepaskan dan dibebaskan. Oleh itu, rayuan ini terhadap pelepasan dan pembebasan tersebut. Hakim bicara mendapati bahawa pembelaan responden adalah bahawa beg berwarna coklat bukan miliknya dan bahawa beg yang dibawanya adalah warna biru. Perayu, walau bagaimanapun, mengemukakan alasan-alasan rayuan bahawa (i) hakim bicara terkhilaf apabila mendapati bahawa terdapat keraguan berkenaan identiti dan warna beg; (ii) ketiadaan keterangan CCTV, profil DNA dan kesan cap jari dan (iii) hakim bicara gagal mempertimbangkan pembelaan adalah satu fikiran semula.

Diputuskan (membenarkan rayuan; mengetepikan perintah pelepasan dan pembebasan)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah memulakan satu pelaksanaan untuk merujuk semula dapatannya yang terdahulu dan memutuskan pada akhir kes pembelaan bahawa terdapat lagi isu-isu berkenaan identiti dan warna beg yang mengandungi dadah-dadah yang dibawa oleh responden apabila mahkamah ini memerintahkan supaya responden memasukkan pembelaan. Oleh kerana Mahkamah Rayuan telah memerintahkan responden memasukkan pembelaannya, harus diambil kira bahawa Mahkamah Rayuan telah memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap responden berkenaan tuduhan terhadapnya.

(1a) Mahkamah Rayuan melakukan penilaian maksimum keterangan sedia ada sebelum memutuskan bahawa kes *prima facie* telah dibuktikan. Oleh itu, Mahkamah Rayuan memutuskan bahawa pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai bagi membuktikan bahan kesalahan, di mana, jika tidak dibantah atau diperjelaskan, mewajarkan sabitan. Dan ini perlu termasuk dapatan bahawa beg berwarna coklat yang mengandungi dadah tersebut dibawa oleh responden dan kemudiannya dirampas oleh PW2 dan pasukannya. Oleh kerana responden boleh disabitkan atas keterangan *prima facie* tersebut, ia harus diambil kira bahawa Mahkamah Rayuan harus memutuskan bahawa keterangan *prima facie* 'must have reached a standard which is capable of supporting a conviction beyond reasonable doubt'. (*Balachandran v. PP*, dirujuk). Oleh kerana panel Mahkamah Rayuan sebelum ini telah memerintahkan responden memasukkan pembelaannya, hakim bicara harus mengarahkan mindanya sama ada keterangan yang dikemukakan oleh responden telah mewujudkan keraguan munasabah bagi mewajarkan pelepasannya. Hakim bicara dengan jelasnya tersalah arah apabila mengambil pendekatan yang sama sekali berbeza.

(2) Keterangan kedua-dua PW2 dan PW3 tidak dipertikaikan bahawa mereka telah melihat responden menyorong beg eks. P10 sebelum dan pada masa mereka mendekati responden. Beg yang mereka lihat dan rampas adalah beg berwarna coklat. Pegawai penyiasat PW5 memberi keterangan bahawa beg yang dia terima daripada PW2 berwarna coklat. Terdapat keterangan langsung yang lebih daripada memadai untuk memutuskan dapatan pasti bahawa beg eks. P10 adalah beg sama yang dibawa oleh responden yang mengandungi dadah tersebut. Oleh itu, keterangan CCTV, profil DNA dan kesan cap jari, yang hanya nilai menyokong, tidak begitu material dan penting, memandangkan keterangan langsung sedemikian. Hakim bicara menolak testimoni-testimoni PW2, PW3 dan PW5 berhubung perkara yang sama tanpa

memberikan apa-apa alasan, iaitu satu pelaksanaan yang imperatif dalam penilaian saksi-saksi, lebih-lebih lagi apabila keterangan saksi-saksi utama ditolak.

(4) Pembelaan responden adalah satu rekaan baru, menyebabkan ia menjadi satu rancangan kemudian, yang tidak mampu diberikan penekanan yang sepatutnya. Sebaliknya, keterangan PW2 dan PW3 berkenaan bagaimana dan di mana mereka temui beg tersebut tetap teguh. Dapatan hakim bicara berkenaan isu beg bertentangan dengan keterangan yang dikemukakan. Ini mewajarkan campur tangan rayuan. Oleh itu, perintah pelepasan dan pembebasan diketepikan dan diganti dengan sabitan di bawah pertuduhan terhadapnya. Dengan itu, responden dijatuhkan hukuman mati di bawah s. 39B(2) ADB, melalui hukuman gantung menurut undang-undang.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP lwn. Sulaiman Saidin [2010] 1 CLJ 184 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(2), First Schedule

For the appellant - Samihah Ghazali; DPP
For the respondent - Muhammad Rafique Rashid Ali; M/s Law Practice Of Rafique

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-68-2011 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JCA:

[1] The respondent was charged before the High Court Shah Alam, with the following charge:

> Bahawa kamu pada 28 Julai 2010, jam lebih kurang 4.20 petang, di Tuntutan Bagasi C, Balai Ketibaan Antarabangsa, KLIA, di dalam Sepang di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya jenis Methamphetamine dengan berat 899 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya, 1952.

[2] The respondent was acquitted and discharged at the end of the prosecution's case. On 12 August 2014, the Court of Appeal had allowed the prosecution's appeal in respect of the said acquittal and discharge and ordered the respondent to enter his defence - see order of the Court of Appeal

at p. 34, jilid 1, rekod rayuan (RR). The defence was heard before the same learned trial judge. At the end of the defence case, the respondent was again acquitted and discharged. Hence, this appeal before us by the Public Prosecutor against the said acquittal and discharge.

[3] We allowed the Public Prosecutor's appeal. We now give our grounds.

The Case For The Prosecution

[4] On 28 July 2010, PW2 (Sub Inspector Ghazali bin Md Din) and his team were on surveillance duty at the arrival hall of the Main Terminal Building, KLIA, more specifically at Carousel C, Level 3.

[5] At about 4.20pm, PW2 saw the respondent pulling a brown coloured (warna coklat) trolley bag (exh. P10) moving towards the exit of the arrival hall. The respondent was also carrying a sling bag (exh. P18).

[6] PW2 approached the respondent and identified himself as a police officer when the respondent walked in front of him. PW2 then inspected his passport and subsequently instructed him to cause the brown coloured bag to be scanned at the scanning machine.

[7] PW2 noticed a suspicious object at the bottom of the brown coloured bag ('the said bag'). He then ordered the respondent to bring the said bag and his sling bag to the narcotics office for further examination.

[8] At the narcotics office, PW2 emptied the said bag. He found the bag was still heavy. He felt a lump (bonjolan) at the bottom part of the bag and when pressed, it emitted a crushing sound (bunyi berderap).

[9] The respondent appeared restless when PW2 started his inspection. Earlier, at the carousel area the respondent was seen pacing the aisle to and fro, his movements appeared staggered and slow and was constantly looking to his left and right.

[10] PW2 proceeded to cut the bottom part of the said bag. He noticed a hard plastic layer wherein the centre of the plastic layer he found a translucent plastic packet containing crystal-like substance suspected to be drugs (exh. P33).

[11] PW2 weighed the substance. The weight was 1325g.

[12] The respondent was arrested and his bags and the drugs were seized. PW2 then marked the exhibits and prepared a search list (exh. P6 at p. 202, jilid 2, RR). PW2 also lodged a police report (exh. P8, at p. 206, jilid 2, RR) and subsequently handed the respondent and the exhibits to the investigating officer, PW5 (Insp Mohd Firdaus bin Ali) *vide* borang penyerahan barang/dokumen OKT (exh. P7 at p. 204, jilid 2, RR).

[13] About two hours later, a corrective police report was lodged (exh. P9 at p. 207, RR) by PW2 when he found errors in his earlier police report.

[14] The chemist, PW4 (Zulkfeli bin Mohd Edin) found the crystal like substance to contain 899g of methamphetamine (hereinafter referred to as 'the drugs'), listed in the First Schedule of the Dangerous Drugs Act 1952 (hereinafter referred to as the 'DDA'). His report is exh. P36, evinced at p. 209, jilid 2, RR.

The Decision Of The Trial Judge At The End Of The Prosecution's Case

[15] The learned trial judge found that the prosecution had failed to establish a *prima facie* case against the respondent on the charge as proffered. He concluded that the prosecution had failed to prove that the bag containing the said drugs was the same bag that was pulled by the respondent at the time the respondent was accosted and later arrested by PW2. At pp. 12 and 13, the learned trial judge stated:

> 17. Malah identiti beg yang dikatakan dibawa oleh 'T' itu juga menunjukkan satu perbezaan warna yang ketara jika dibandingkan dengan gambar yang dikemukakan oleh pihak pendakwaan sendiri. P5(A) dan P5(B) jelas memaparkan kepada kita sebuah beg berwarna biru dan bukan coklat. SP1 dan SP5 bersetuju kedua-dua gambar tersebut menunjukkan sebuah beg berwarna biru gelap, berbeza dengan P10 yang dikatakan berisi dadah itu yang jelas berwarna coklat. SP5 cuba menjelaskan bahawa penataan cahaya telahpun menyebabkan perubahan warna beg tersebut, tetapi ini hanyalah pendapat beliau semata-mata yang tidak disokong oleh apa-apa keterangan lain untuk fakta itu.
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> 18. Keterangan Pegawai Penyiasat yang menyatakan beliau telah menerima eksibit P10 tersebut daripada SP2 sebuah beg pakaian berwarna coklat, bagaimanapun pada masa yang sama apabila dirujuk kepada eksibit P5(A), (B) dan (C) beliau juga mengecamkan sebuah beg yang berwarna biru gelap yang mana beliau katakan telah diserahkan oleh SP2 kepadanya.
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> 19. Implikasi daripada keterangan ini menunjukkan satu percanggahan keterangan yang ketara oleh SP5 iaitu beg yang mana satu yang dibawa oleh 'T' sama ada biru atau coklat, lebih ditekankan lagi sama ada eksibit P10 atau beg biru gelap seperti di dalam gambar-gambar P5(A), (B) dan (C)?
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> 20. Percanggahan ini pada pendapat saya memberikan kesan yang negatif kepada kes pihak pendakwaan.
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> 21. Sepatutnya SP5 perlu menjalankan siasatan mendalam berkenaan dengan pakaian-pakaian yang berada di dalam beg P10 tersebut bagi menunjukkan bahawa ia adalah milik 'T' sama ada melalui 'fitting test' ataupun ujian DNA. Ketiadaan keterangan-keterangan tersebut membolehkan mahkamah ini beranggapan bahawa penafian 'T' iaitu 'No, this is not my bag' berkemungkinan juga benar. Tambahan pula 'T' tidak cuba untuk melarikan diri atau sekurang-kurangnya melepaskan beg tersebut, iaitu semasa SP2 memperkenalkan dirinya sebagai 'polis'. Keterangan kes pendakwaan juga menunjukkan 'T' cukup bekerjasama apabila diminta untuk mengimbaskan beg itu, 'T' juga menurut sahaja arahan polis untuk melakukan pemeriksaan mengenai isi kandungan beg itu.

The Respondent's Defence Upon Being Ordered To Enter His Defence By The Court Of Appeal

[16] The respondent gave evidence on oath.

[17] The respondent testified that he was a furniture maker in Iran, earning about 1000 USD per month.

[18] This was his first trip to Malaysia and his purpose was to find a better paying job to support his family. He chose Malaysia as many of his Iranian friends were already in Malaysia.

[19] He brought a blue coloured trolley bag and a sling bag with him.

[20] On arrival at KLIA, he took his blue coloured bag at carousel C. On his way out of the arrival hall, he was stopped by a police officer who then instructed him to scan his bag, which he did. Subsequently, he was taken to a room with his blue coloured bag. There were many other Iranians in the room. He was instructed by the police to wait in the said room.

[21] After waiting for about 30 to 40 minutes, the police came back and told him that they found drugs inside his bag, pointing to a brown coloured bag, exh. P10.

[22] The respondent protested his innocence by saying repeatedly "This is not my bag. This is not my bag!".

[23] The respondent denied that the brown coloured bag, exh. P10 was his and reiterated that he did not carry drugs. He also claimed that the police may have change the luggage tag bearing his name that was affixed to the said bag.

Decision Of The Trial Judge At The End Of The Defence Case

[24] His Lordship found as a fact that the respondent's defence was grounded upon the denial that the brown coloured bag, P10, was not his and that the bag which he brought from Iran, was blue in colour and not brown as shown in the photographs, exhs. P5A and P5B.

[25] Premised upon the said finding, the learned trial judge further stated at pp. 26 and 27, jilid 1, RR:

> 18. 'T' tidak menafikan tag bag yang dikemukakan adalah di atas nama beliau dan nombor penerbangan juga adalah sama seperti 'E-Ticket' dan 'Baggage Claim Tag' yang ada padanya dan telah dirampas oleh pihak polis.
>
> 19. Di dalam kes ini pihak pendakwaan bagaimanapun telah gagal untuk mengemukakan keterangan CCTV, DNA dan cap jari bagi menunjukkan 'connection' 'T' dengan eksibit P10 tersebut. Di mana saya berpendapat seandainya bukti-bukti ini dikemukakan ia akan lebih membantu mahkamah ini untuk menemui satu keputusan.

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20. Walaupun dengan ketiadaan bukti-bukti CCTV, DNA profil dan cap jari, yang mana merupakan bukti-bukti sokongan sahaja, tetapi dalam keadaan di mana mahkamah tidak mempunyai pilihan, bukti-bukti ini adalah penting dan mustahak.

21. Samada pembelaan 'T' di atas sumpah telah berjaya menimbulkan satu
B keraguan yang munasabah? Malangnya Mahkamah Rayuan di dalam memutuskan 'T' dipanggil membela diri di atas pertuduhan ini telah tidak memberikan apa-apa alasan mengapakah 'T' harus membela diri.

22. Sepertimana dihujahkan oleh peguambela 'T', bahawa versi pembelaan telah pun ditimbulkan di awal kes pendakwaan lagi, maka adalah menjadi
C satu beban ke atas pihak pendakwaan untuk menutup apa-apa keraguan atau 'gap' yang ada, kegagalan berbuat demikian membolehkan mahkamah beranggapan sebaliknya.

[26] Based upon the above findings, the learned trial judge found that the defence had raised a reasonable doubt upon the prosecution's case. Consequently, the respondent was acquitted and discharged.
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The Appeal Before Us

[27] The learned Deputy Public Prosecutor ('DPP') for the appellant posited the following grounds of appeal:

E (i) the learned trial judge had erred when he found that there is a doubt regarding the identity and colour of the bag;

(ii) the materiality of the absence of CCTV evidence, DNA profiles and fingerprint impressions; and

F (iii) the learned trial judge had failed to consider that the defence is an afterthought defence.

[28] The learned DPP submitted that the learned trial judge had clearly revisited his earlier findings at the end of the prosecution's case upon which he had acquitted the respondent when again he had alluded to the same issues
G at the end of the defence to again acquit the respondent. At both stages, it revolved around the colour of the said bag (exh. P10) ie, whether it was a brown or blue coloured bag.

[29] The learned DPP further submitted that the learned trial judge had misdirected himself when he held that there was a doubt as to the identity
H of the bag in which the colour of the bag is blue and not brown, the same reason for acquitting the respondent at the end of the prosecution's case, when the Court of Appeal had ruled that the prosecution had made out a *prima facie* case and ordered the respondent to enter his defence. Plainly, by doing so the learned trial judge had revisited the said ruling of the Court of
I Appeal.

[30] Premised upon the authority of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692 at p. 709, the learned DPP submitted that since the defence of the respondent was called by this court, the learned trial judge should therefore focussed on whether the defence has cast a reasonable doubt upon the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond a reasonable doubt before finding the respondent innocent or guilty of the offence as charged.

[31] In respect of the second ground, the learned DPP submitted that even without the CCTV evidence, DNA profiles and fingerprints, the prosecution had sufficiently proven its case grounded upon the evidence of PW2 and PW3 who both saw the respondent pulling the brown coloured trolley bag and putting it into the scanning machine. In addition, there was also a luggage tag bearing the respondent's name affixed on the bag.

[32] There was also no challenge by the defence that the police had mixed up the bag and it was also not suggested to the prosecution witnesses that the police had planted the luggage tag on the bag, exh. P10, rendering the defence to be an afterthought.

Our Decision

The First Ground

[33] We were with the learned DPP's contention that the learned trial judge had embarked on an exercise to revisit his earlier findings. We have reproduced the learned trial judge's grounds of acquitting the respondent at the end of the prosecution's case in para. 15 above and the grounds of acquittal at the end of the defence in para. 25. It is apparent that the learned trial judge had revisited his earlier findings and concluded at the end of the defence case that there were still issues regarding the identity and colour of the bag containing the drugs that was carried by the respondent when this court had ruled and ordered the respondent to enter his defence.

[34] We were in no position to review the said decision of the earlier panel of the Court of Appeal nor were there any necessity to review the same. Since the Court of Appeal had ordered the respondent to enter his defence, it must be taken that the Court of Appeal had ruled that the prosecution had made out a *prima facie* case against the respondent in respect of the charge levelled against him. It must further be taken that the Court of Appeal must have conducted a maximum evaluation of the evidence available before it ruled that a *prima facie* case has been made out. Hence, it must also be taken that the Court of Appeal had ruled that the prosecution has adduced credible evidence proving each ingredient of the offence which, if unrebutted or unexplained, would warrant a conviction. And, this must necessarily include the finding that the brown coloured bag, exh. P10, was the bag containing the said drugs that was carried by the respondent and later seized by PW2 and his team.

[35] Additionally, following the Federal Court case of *Balachandran v. PP* [2005] 1 CLJ 85, as the respondent can be convicted on the said *prima facie* evidence, it must be taken that the Court of Appeal must have ruled that the *prima facie* evidence 'must have reached a standard which is capable of supporting a conviction beyond a reasonable doubt'.

[36] Since the previous panel of the Court of Appeal had ordered the respondent to enter his defence, the learned trial judge should hence direct his mind on whether the evidence posited by the respondent has created a reasonable doubt to warrant his acquittal - see *Duis Akim & Ors v. PP (supra)*. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, the Federal Court put it succinctly:

> [25] In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a *prima facie* case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a *prima facie* case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.

[37] The learned trial judge has clearly misdirected himself when he took a different approach altogether as reiterated in the earlier paragraphs - see also *PP lwn. Sulaiman Saidin* [2010] 1 CLJ 184; [2010] 3 MLJ 383.

The Second And Third Grounds

[38] The evidential value of CCTV evidence, DNA profiles and fingerprint impressions as decided by high authority is only corroborative. The learned trial judge correctly appreciated the position. In *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233, the Federal Court stated that:

> Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

[39] Now, having scrutinised the evidence, we were with the learned DPP that even without the CCTV evidence, DNA profiles and fingerprint impressions, there are sufficient evidence to prove the prosecution's case.

[40] The evidence of both PW2 and PW3 (DSM Hairudin bin Abdullah) were uncontroverted that they saw the respondent pulling the bag, exh. P10, before and at the time they approached the respondent. The bag they saw and seized was a brown coloured bag carrying the "Sphere" brand name, exh. P10. It was the respondent himself who had put the said bag in the scanning machine and it was equally the respondent himself who had carried

the said bag to the narcotics office. Both testified that the examination of the said bag was done in the presence of the respondent. These are uncontroverted direct evidence which needs no further support for its sustenance.

[41] PW2 marked the said bag with the letter "G", the date 28 July 2010 and affixed his signature thereon. In court, he identified the same markings on the bag exh. P10 as the markings he had made and identified the said bag, exh. P10, as the bag carried by the respondent through the said markings. This was not challenged. PW2 and PW3 also denied that the colour of the said bag was blue and not brown.

[42] PW2 also noticed the luggage tag affixed to the handle of the said bag. It bore the respondent's name. He also identified the said bag through this luggage tag. This was also not challenged. On the absence of the said luggage tag in the photographs exhs. P5(A) and (B), he said at p. 57, jilid 1, RR:

> … gambar ini diambil dalam kedudukan beg melintang ia tidak dapat dilihat dan sekiranya diambil dari kepala beg ia dapat dilihat dengan jelas.

[43] In addition, PW2 also identified the cut he had made at the bottom of the bag, which is also visible in the photographs. He also said that the markings he had made on the said bag are also visible in the photograph, exh. P5(C).

[44] The documentary exhibits senarai bongkar (exh. P6), borang penyerahan barang/dokumen OKT (exh. P7) and PW2's police reports (exhs. P8 and P9) all alluded to a brown coloured trolley bag with luggage tag number RB787836, bearing the respondent's name 'Ebrahim Mirzaei'. These documents corroborated the testimonies of PW2 and PW3.

[45] The investigating officer, PW5, testified that the bag he received from PW2 was brown in colour and that he had marked the said bag with the marking "F" and affixed his signature thereon. He identified the said bag exh. P10, as the bag he had received from PW2 from the said markings he had made and affixed. He said that the markings "G" and date 28 July 2010 were PW2's markings. He also identified PW2's signature affixed on the said bag. He also noticed the cut mark at the bottom of the bag, which he said was done by PW2. PW5's evidence was also uncontroverted.

[46] On the colour of the said bag, exh. P10, which appeared blue in photographs exhs. P5(A) and P5(B), PW5 at p. 93, jilid 1, RR, said:

> Memang saya tidak ada sebarang latihan atau kelayakan tetapi berdasarkan pengalaman saya bertanyakan kepada kedai gambar bahawa perkara ini mungkin boleh terjadi disebabkan pantulan cahaya yang selalunya menggunakan kamera yang mempunyai negatif …

[47] PW5 may not be an expert in photography but his explanation is, however, probable in the absence of any other explanation. It does make sense as the photograph of the said bag in exh. P5(9) appeared brownish in colour. Nevertheless, PW5 reiterated, at p. 94, of the same jilid:

> S: Walaupun terdapat perbezaan dari segi warna, adakah beg dalam gambar tersebut merupakan beg yang sama yang diterima dari SM Ghazali dan beg yang sama dalam Mahkamah pada hari ini?
>
> J: Ya.

[48] Based upon the evidence enumerated above, there were more than ample direct evidence to conclude a definite finding that the bag exh. P10 was the same bag that was carried by the respondent containing the said drugs. Hence, the materiality of the CCTV evidence, DNA profiles and fingerprint impression, which anyway is only of corroborative value, assumed little significance in the light of such direct evidence. The learned trial judge appeared to have ignored and rejected the testimonies of PW2, PW3 and PW5 in respect of the same without assigning any reason or reasons thereto, an imperative exercise in the evaluation of witnesses, more so when the evidence of principal witnesses are rejected.

[49] The respondent said that there may be a mixed up of the bag by either PW2 or PW3. He also acknowledged that the luggage tag bearing his name was affixed on the handle of the said bag. However, he contended that the same was planted either by PW2 or PW3.

[50] We agreed with the learned DPP that this defence is a recent invention. It was never suggested to PW2, PW3 and the investigating officer, PW5, rendering it to be an afterthought incapable of being accorded its due weight. On the other hand, PW2 and PW3's evidence on how and where they found the said luggage tag was unshaken to the end.

[51] In the final analysis, we were of the firm view that the findings of the learned trial judge in respect of the bag in issue is verily against the weight of evidence. It merits our appellate intervention.

Conclusion

[52] We found there were merits in the appeal lodged by the Public Prosecutor. Hence we allowed the appeal. The order of acquittal and discharge of the respondent by the learned trial judge at the end of the defence case is set aside and substituted with a conviction under the charge as proffered against him. Correspondingly, the respondent is sentenced to suffer the death penalty under s. 39B(2) of the DDA, by hanging according to law.